IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1127

STERLING JACK BROWN, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on January 12, 1977.

CITATIONS TO OPINIONS BELOW

The United States District Court for the Southern District of Mississippi, Judge Harold Cox presiding, did not render an opinion or finding of fact in this case. A three judge panel of the United States Court of Appeals for the Fifth Circuit, consisting of Judges James P. Coleman, John C. Golbold, and Gerald Bard Tjoflat, affirmed the District Court on January 12, 1978, in a per curiam opinion rendered under Local Rule 21. This opinion is reproduced herein as Appendix

"A". The petitioner has sought a Stay of Mandate from the Circuit Court of Appeals for the Fifth Circuit, but no application to any Justice of this court for a Stay of Proceedings has been filed pending the filing of this Writ of Certiorari and a final determination thereon by this court.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. In order to sustain the conviction under 41 U.S.C. § 51 and § 54, must the Government prove beyond a reasonable doubt that the alleged kick-back was given in connection with goods and/or services properly purchased on behalf of the United States or an agency thereof?

2. Is it an abuse of discretion for a Federal District Court to allow a deliberating jury to play a tape admitted in evidence but never played in open court during the trial?

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The constitutional provisions involved are the due process clause of the Fifth Amendment, the Right to Confrontation Clause of the Sixth Amendment and the Due Process Clause to the Fourteenth Amendment of the United States Constitution. The statute giving the District Court power to try offenses against the laws of the United States is 18 U.S.C. § 3231. Petitioner was indicted and tried for a violation of 41 U.S.C. § 51 and § 54. These provisions are printed in Appendix "B" herein.

STATEMENT OF THE CASE

Petitioner is an individual indicted upon one count of receiving a kick-back in violation of the Anti-Kick-Back-Act, 41 U.S.C. Sections 51-54. The indictment was filed of record September 24, 1976, and the defendant pled not guilty. The District Court assumed jurisdiction pursuant to 18 U.S.C. § 3231.

In 1970, Ingalls Shipbuilding Division of Litton Industries, Inc., Pascagoula, Mississippi, was engaged by the United States Navy as the prime contractor for the construction of thirty (30) Naval vessels to-wit: Spruance Class Destroyers, under a United States Navy Construction Program known as DD 963.

The extensive written contract contained a definition of "special tooling". This definition prohibited charges against the United States Navy for the cost of tools that were not strictly limited to the development or production of supplies or parts for the United States Navy. Further, it prohibited charges against the United States Navy for the purchase of new tools which were intended to replace old tools that the contractor acquired in advance of the effective date of the contract.

A sub-contract was let by the prime contractor, Litton, for the production of certain wrenches used to install fastenings for required water tight bulkheads. The defendant was charged with receiving a kick-back with regard to that sub-contract.

At a pre-trial motion, uncontradicted testimony by a long time Litton employee showed that the particular wrenches produced by the sub-contractor were common in maritime construction since World War II and were not designed for any special U.S. Navy use.

Further, the witness testified that similar wrenches were already owned by Litton prior to the effective date of the contract and that the said contract was merely for tool replacement purposes. Further uncontradicted testimony presented at trial by another long time Litton employee was to the same effect.

Defense counsel twice moved for dismissal upon the grounds that the Government failed to show that the wrenches fell with the "special tooling" provision of the contract. In response to the first pre-trial motion, the District Court refused to make any finding of fact and ruled that the interpretation of the contract was a jury question. The second motion at trial was also overruled. Although 41 U.S.C. § 53 expressly empowers the General Accounting Office to determine the existence of alleged kick-backs, the Government failed to introduce any testimony or evidence from that office.

In the course of the Government's case in chief, a cassette tape recording of an alleged conversation, held between the petitioner and the sub-contractor was introduced over vigorous defense objection. The Government never offered to play the cassette tape recording in open court, nor was a transcript, allegedly made from the cassette tape recording, ever introduced in evidence.

On March 30, 1977, the jury retired to begin its deliberation. When the jury returned to render its verdict on March 31, 1977, a juror made the following inquiry which appears in the trial record:

JUROR FADDEN: I would like to know why the tape was played for the jury when it was not played in open court. This is what determined the verdict.

THE COURT: Lady, I think your feminine curiosity has just got the upper hand of you. I don't tell the Government how to play these tapes or how to put on any of their evidence. You may be seated. I don't know why it was not played. I think they said it wasn't legible, but you asked for it to be played and I allowed it to be played and I assume that you were satisfied from having heard it what happened. I don't know what happened. That's the reason we got you.

See, you ladies, just don't ever get rid of your curiosity, even when you got on this jury. I don't condemn you for that. That's just part of your make-up. Things like that are just completely unimportant, just frivolous, but we want to find out whether this man is guilty or not guilty. I don't know what you decided. I have no idea, and I don't care because I believe you did what you thought was right. That's all I wanted. Have you arrived at a unanimous verdict?

THE FOREMAN: Yes, we have, your Honor.

THE COURT: Hand it to the Marshall (verdict read)

THE CLERK: Is this a unanimous verdict, jurors?

THE JURY: Yes, sir.

THE CLERK: So say each of you?

THE JURY: Yes.

THE COURT: Lady, I didn't see you move your lips. You, lady, with your curiosity back there.

JUROR FADDEN: Yes, sir.

The petitioner was found guilty and, on April 25, 1977, the petitioner was sentenced to imprisonment for two (2) years and to pay a fine in the sum of five thousand dollars ($5,000.00).

Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Fifth Circuit where a three-judge panel of judges for the Fifth Circuit Court of Appeals considered the case. On January 12, 1977, the Fifth Circuit affirmed the judgment of the District Court in a per curiam opinion rendered pursuant to its local Rule 21.

REASONS FOR GRANTING WRIT

The Anti-Kick-Back Act, U.S.C. Sections 51-54, is ambiguous in terms, and deficient in legislative history and relevant precedent. A definitive ruling by this court is thus mandated to instruct Government officials as well as defendants charged under the statute with respect to proof necessary to establish the elements of the crime.

The propriety of the judicial actions of a lower court judge is a subject rarely necessitating comment by this Court. However, where a District Judge unilaterally directs that information not presented in open court be submitted to a deliberating jury, then the supervisory powers of this Court are invoked.

The magnitude and significance of these two issues are clear. The Fifth Circuit, in affirming the conviction under its Local Rule 21, has deprived the judicial system and this petitioner of a dispositive answer to these unresolved questions. Only this Court has the authority to alleviate this grave injustice.

SUMMARY OF THE ARGUMENTS

I.

The common law of this country is "that the due process clause protects the accused against conviction

except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In Re Winship,* 397 U.S. 358, 364, 25 L. Ed. 2d 368, 375, 90 S. Ct. 1068, 1073 (N.Y. 1970). The burden is upon the prosecution "to prove that an accused has commited an act bringing him within a criminal statute." *Johnson* v. *Florida,* 391 U.S. 596, 598, 20 L. Ed 2d 838, 840, 88 S. Ct. 1713 (1968).

This court has long held that, where a statute is invoked, "laws which create crime ought to be explicit that all men subject to their penalty may know what acts it is their duty to avoid." *United States* v. *Brewer,* 139 U.S. 278, 288, 35 L. Ed 190, 193, 11 S. Ct. 538, 541 (1891). Additionally, "there can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakeably within the statute." *United States* v. *Lacher,* 134 U.S. 624, 628, 33 L. Ed. 1080, 1083, 10 S. Ct. 625, 626 (1889).

The "Anti-Kick-Back Act", 41 U.S.C. § 51-§ 54, has been labeled as "ambiguous". In *United States* v. *Perry,* 431 F 2d 1020 (CA 9, Cal. 1970) at 1023, the court considered 41 U.S.C. § 51 and concluded:

> "We do not now decide whether either construction of the Act is correct. *We note only that to decide the issue means to determine the meaning of an extraordinarily ambiguous statute in the face of an inconclusive legislative history, a nearly complete absence of relevant precedent* and a totally inadequate factual record. The Anti-Kick-Back Act represents no minor or inconsiderable legislative policy, but one which determines the rights and responsibilities of thousands of suppliers of goods and services to the government, and has significant impact on the course of Federal procurement." (Emphasis added)

This court has recently granted Writs of Certiorari in other cases where an ambiguous statute was considered. *See, e.g.*: *Scarborough* v. *United States,* —— U.S. ——, 52 L. Ed. 2d, 582 97 S. Ct. 1963 (1977); *United States* v. *Donovan,* —— U.S. ——, 50 L. Ed 2d 652, 97 S. Ct. 658 (1977); and *United States* v. *New York Telephone Company,* —— U.S. ——, 54 L. Ed. 2d 376, 98 S. Ct. —— (1977).

When considering such ambiguous statutes this court has ruled that the statute ought to be construed in favor of lenity. *Scarborough,* supra, and *Rewis* v. *United States,* 401 U.S. 808, 812, 28 L. Ed 2d 493, 497, 91 S. Ct. (1971) citing *Bell* v. *United States,* 349 U.S. 81, 83, 99 L. Ed 905, 910, 75 S. Ct. 620 (1955).

This court has ruled upon 41 U.S.C. § 51-§ 54 in only one instance, *United States* v. *Acme Process Equipment Company,* 385 U.S. 138, 17 L. Ed 2d 249, 87 S. Ct. 350 (Ct. Cl., 1966), reh. den. 385 U.S. 1032, 17 L. Ed. 2d 680, 87 S. Ct. 738, where the criminal facets of the Act were not addressed.

Because the Act was and is ambiguous, the Government could not know "every fact necessary to constitute the crime", nor could the case be placed plainly "and unmistakably within the statute". Since the Act is ambiguous, it offers little precedential guidance, and this court has never addressed itself to this area of the law, the court ought to grant a Writ of Certiorari to remedy these defects with an eye toward lenity in this case.

At present, the closest authority on point is *United States* v. *Dobar,* 223 F. Supp. 8 (M.D. Fla., 1963) which held that a proper showing of the nexus between

an alleged kickback and the Federal Contract is mandatory.

The Government, in the instant case, failed to prove a fact necessary to constitute the crime with which the Petitioner was charged, to-wit: a nexus between the alleged kickback and the Federal Contract. The ambiguity of the Act set the stage for a result contrary to *Dobar, supra.* Obviously, such a situation unavoidably destroyed the Due Process of Law for the Petitioner. It should also be noted that the Government failed to make any showing that the General Accounting Office had inspected or audited the propriety of the sub-contract charges against the United States Navy. Surely, such a showing was implied when Congress enacted 41 U.S.C. § 53. If this was not the intent of Congress, then of what value is 41 U.S.C. § 53 at all?

In sum, the Act is ambiguous and has little precedent to offer. The facts necessary to constitute the crime under 41 U.S.C. § 51 and § 54 are undefined. The audit required by 41 U.S.C. § 53 is undefined and is totally absent here. The testimony presented in this case clearly showed that the wrenches, which were the subject of the sub contract, were not and could not be properly charged to the United States Navy. Due to these blatant deficiencies, the petitioner now seeks a Writ of Certiorari to more fully present his case.

II.

The proper predicate for the admission of a tape recording is now well established. *See, e.g.*: *United States* v. *McKeever,* 169 F. Supp. 427 (S.D.N.Y. 1958); Annotation, 58 A.L.R. 2d 1024.

In this case, a cassette tape recording was introduced as evidence amidst confusion and over vigorous defense objection, inconclusive authentication, and for unstated purposes. The tape recording was never played in open court, nor was an alleged transcript of that recording introduced as evidence.

The jury heard the tape recording for the first time during its deliberations. This unusual occurrence is the reserve of the normal situation, i.e. the jury rehearing a tape previously heard in open court. *See e.g.*: *Sears* v. *United States,* 343 F. 2d 139 (CA 5, Ga. 1965). The record is silent as to what the jury heard. This silence has been as condemned by other courts as being analogous to the omission of a material witness' testimony. *See e.g.*: *State* v. *Gonya,* 107 R.I. 594, 268 A 2d 729, 731 (1970) and *People* v. *Mulvey,* 196 Cal. App. 714, 719, 16 Cal. Rptr. 821, 824.

Only the *effect* of the tape recording upon the jury is known. "This is what determined the verdict."

A jury should not experiment so as to put them in possession of evidence not presented in open court. *United States* v. *Beach,* 296 F. 2d 153, 95 A.L.R. 2d 342 (CA 4, Va. 1965). Here the jury's experiment was executed with the active assistance of the final judge and without the knowledge of the Government or defense counsel. The experiment provided unsworn, unexamined, and unknown evidence to the jury. The damage to the Petitioner is manifest as the court's abuse of discretion.

Evidence not received in open court should not be considered by a jury. *Sheppard* v. *Maxwell,* 384 U.S. 333, 350-351, 16 L. Ed 2d 600, 613, 86 S. Ct. 1507 (1966). The right to a fair trial is a fundamental right

protected by the 14th Amendment. *Estelle* v. *Williams,* 425 U.S. 501, 503, 48 L. Ed. 2d 126, 130, 96 S. Ct. 1691, 1692 (Tx. 1976) reh. den. 426 U.S. 954, 49 L. Ed. 2d 1194, 96 S. Ct. 3182. Although the actual impact of a particular practice on the judgment of jurors cannot always be fully determined, this court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny. *Estelle, supra.*

The "deletious" effect is manifest. This court ought to subject this case to "close judicial scrutiny". Since practices which present an incomplete record are condemned, jury experiments are condemned, and the right to a fair trial is a fundamental right, then this court ought to grant the Writ of Certiorari for close scrutiny of this case.

III.

The record contains no findings of fact or opinions of any court. The Fifth Circuit chose to remain behind the wall of its local rule 21. This case warranted a written determination by that court. A depositive answer to the unresolved questions raised herein is essential to assure the rights of defendants in this case and those to come.

CONCLUSION

The Writ of Certiorari ought to be granted, or in the alternative, the case should be remanded to obtain a written determination from the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Appendix

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No: 77-5277

UNITED STATES OF AMERICA

v.

STERLING JACK BROWN

BEFORE COLEMAN, GODBOLD, and TJOFLAT, Circuit Judges:

PER CURIAM: AFFIRMED See Local Rule 21.

APPENDIX B

U.S. Constitution

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Criminal Procedure

Section 3231

District Courts

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

41 U.S.C. § 51

Fees or Kick-Backs by Subcontractors on Negotiated Contracts; Recovery by United States; Conclusive Presumptions; Withholding of Payments

The payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly, by or on behalf of a subcontractor, as defined in section 52 of this title (1) to any officer, partner, employee, or agent of a prime contractor holding a negotiated contract entered into by any department, agency, or establishment of the United States for the furnishing of supplies, materials, equipment or services of any kind whatsoever; or to any such prime contractor or (2) to any officer, partner, employee, or agent of a higher tier subcontractor holding a subcontract under the prime contract, or to any such subcontractor either as an inducement for the award of a subcontract or order from the prime contractor or any subcontractor, or as an acknowledgement of a subcontract or order previously awarded, is prohibited. The amount of any such fee, commission, or compensation or the cost or expense of any such gratuity or gift, whether heretofore or hereafter paid or incurred by the subcontractor, shall not be charged, either directly or indirectly, as a part of the contract price charged by the subcontractor to the prime contractor or

higher tier subcontractor. The amount of any such fee, cost, or expense shall be recoverable on behalf of the United States from the subcontractor or the recipient thereof by setoff of moneys otherwise owing to the subcontractor either directly by the United States or by a prime contractor under any contract or by an action in an appropriate court of the United States. Upon a showing that a subcontractor paid fees, commissions, or compensation or granted gifts or gratuities to an officer, partner, employee or agent of a prime contractor or of another higher tier subcontractor, in connection with the award of a subcontract or order thereunder, it shall be conclusively presumed that the cost of such expense was included in the price of the subcontract or order and ultimately borne by the United States. Upon the direction of the contracting department or agency or of the General Accounting Office, the prime contractor shall withhold from such sums otherwise due a subcontractor any amount reported to have been found to have been paid by a subcontractor as a fee, commission, or compensation or as a gift or gratuity to an officer, partner, employee, or agent of the prime contractor or another higher tier subcontractor.

41 U.S.C. § 52

SAME, DEFINITIONS

For the purpose of Sections 51-54 of this title, the term "subcontractor" is defined as any person, including a corporation, partnership, or business association of any kind, who holds an agreement or purchase order to perform all or any part of the work or to make or to furnish any article or service required for the performance of a negotiated contract or of a subcontract entered into thereunder; the term, "person" shall include any subcontractor, association, trust, joint-stock company, partnership, or individual; and the term "negotiated contract" means made without formal advertising.

41 U.S.C. § 53

SAME, POWER OF GENERAL ACCOUNTING OFFICE

For the purpose of ascertaining whether such fees, commissions, compensations, gifts, or gratuities have been paid or granted by a subcontractor, the General Accounting Office shall have the power to inspect the plants and to audit the books and records of any prime contractor or subcontractor engaged in the performance of a negotiated contract.

41 U.S.C. § 54

SAME, PENALTIES

Any person who shall knowingly, directly or indirectly, make or receive any such prohibited payment shall be fined not more than $10,000.00 or be imprisoned for not more than two years, or both.

No. 77-1127

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OCTOBER TERM, 1977

STERLING JACK BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Mississippi, petitioner was convicted on one count of receiving an illegal kickback, in violation of 41 U.S.C. 51 and 54. He was sentenced to two years' imprisonment and fined $5,000. The court of appeals affirmed (Pet. App. 1a).[1]

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[1]On February 27, 1978, petitioner, who had been free on bond pending appeal, filed an application for stay of the court of appeals' mandate pending final disposition of his petition for a writ of certiorari. On March 1, 1978, Mr. Justice Powell ordered a temporary stay pending receipt of the government's response. That response, which embodied this Memorandum in Opposition, was filed on March 8, 1978 and Mr. Justice Powell vacated the stay and denied the application for a stay on March 9, 1978.

STATEMENT

The evidence at trial showed that petitioner was employed as a section manager in charge of area engineering at the Ingalls Ship Building Company ("Ingalls") (Tr. 283). Ingalls held a prime contract from the United States for construction of destroyers for the Navy. On August 26, 1975, petitioner met with Frank Irwin, the general manager of P & D Tool and Die Company ("P & D Tool") to discuss a subcontract for production of special wrenches necessary for construction of the destroyers (Tr. 102-103). Petitioner told Irwin that P & D Tool would get a subcontract if Irwin agreed to kick back "$4,080 for [petitioner] and his people," and that contracts would be awarded in the future in return for three percent kickbacks (Tr. 108-109).

Irwin notified his superiors and was instructed to pretend to go along with petitioner's proposal (Tr. 111-112). As a result, P & D Tool was awarded the subcontract and Irwin agreed to meet petitioner for payment of the kickback. At a meeting on October 15, 1975, petitioner received $2,040 in marked bills from Irwin. The two also discussed the possibility of providing other contracts for P & D Tool. A microphone and transmitter had been concealed on Irwin, and this conversation was recorded by surveilling police officers. Petitioner was arrested on the scene (Tr. 111-113, 125-128, 189-190).

ARGUMENT

The issues that petitioner has raised are insubstantial and review by this Court is inappropriate.

1. Relying principally on *United States* v. *Perry*, 431 F. 2d 1020 (C.A. 9), petitioner contends (Pet. 7) that the "Anti-Kickback Act" (41 U.S.C. 51-54)[2] is "ambiguous." *Perry* was a civil action for recovery of alleged kickbacks and involved a motion for summary judgment submitted on affidavits. The court of appeals held that in light of the "totally inadequate factual record" in that case, the court could not determine whether payments described in the affidavits between two subcontractors were "normal trade practices" or "inducements" or "acknowledgements"

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[2]41 U.S.C. 51 provides, in relevant part:

> The payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly, by or on behalf of a subcontractor, as defined in section 52 of this title, (1) to any officer, partner, employee, or agent of a prime contractor holding a negotiated contract entered into by any department, agency, or establishment of the United States for the furnishing of supplies, materials, equipment or services of any kind whatsoever; or to any such contractor or (2) to any officer, partner, employee, or agent of a higher tier subcontractor holding a subcontract under the prime contract, or to any such subcontractor either as an inducement for the award of a subcontract or order from the prime contractor or any subcontractor, or as an acknowledgement of a subcontract or order previously awarded, is prohibited. * * *

41 U.S.C. 52 provides, in relevant part:

> * * * [T]he term "subcontractor" is defined as any person, including a corporation, partnership, or business association of any kind, who holds an agreement or purchase order to perform all or any part of the work or to make or to furnish any article or service required for the performance of a negotiated contract or of a subcontract entered into thereunder * * *.

41 U.S.C. 54 provides:

> Any person who shall knowingly, directly or indirectly, make or receive any such prohibited payment shall be fined not more than $10,000 or be imprisoned for not more than two years, or both.

forbidden by the statute. 431 F. 2d at 1021-1023. The court of appeals vacated the summary judgment, preferring not to decide the issues presented "in the absence of the light that may be shed by a factual record developed at trial." *Id.* at 1023. Here, by contrast, a trial has been held and the record clearly reveals that petitioner's payment from Irwin was an "inducement" or "acknowledgement" directly related to the awarding of a contract. Indeed, petitioner makes no claim to the contrary. Thus, the questions that troubled the court of appeals in *Perry* are not present here, and petitioner's charge that the statute is "ambiguous" is without merit on this record.

2. Petitioner contends (Pet. 9) that the evidence did not prove "a nexus between the alleged kickback and the [f]ederal [c]ontract." That claim is also refuted by the record. The evidence established that petitioner solicited and received the kickback in return for a subcontract to produce special wrenches for the prime contractor's use solely in the construction of ships under a contract with the United States Navy (Tr. 11, 38-39, 249). Consequently, the "nexus" between petitioner's kickback scheme and the award of a subcontract on a project for the Navy was plainly demonstrated for the jury.[3]

3. Finally, petitioner contends (Pet. 10-11) that it was improper for the jury in its deliberations to listen to a tape recording that had not been played in open court. Petitioner did not, however, object at trial to inclusion of

[3]Contrary to petitioner's contention (Pet. 4), 41 U.S.C. 53 does not require the General Accounting Office (GAO) to inspect or audit government contractors; it merely provides that the GAO "shall have the power" to do so. See H.R. Rep. No. 212, 79th Cong., 1st Sess. 2 (1945). Thus GAO's decision not to inspect this transaction is of no help to petitioner.

the recording among the exhibits submitted to the jury; therefore his objection now comes too late. In any event, there was no error here.

The tape was properly admitted into evidence after it had been authenticated as a recording of the October 15, 1975, meeting at which petitioner received the kickback payment from Irwin (Tr. 219-221). See, *e.g.*, *Osborn* v. *United States*, 385 U.S. 323, 326-327; *United States* v. *Biggins*, 551 F. 2d 64, 66-68 (C.A. 5); *United States* v. *Iaconetti*, 540 F. 2d 574, 578 (C.A. 2), certiorari denied, 429 U.S. 1041; *United States* v. *Buzzard*, 540 F. 2d 1383, 1386 (C.A. 10), certiorari denied, 429 U.S. 1072. Moreover, petitioner was furnished with a transcript of the tape, which he used during cross-examination of government witnesses (Tr. 170-172, 202-205), and he now makes no claim that the tape was not exactly what it was purported to be or that it had been tampered with. The tape was in evidence, and it was within the discretion of the court to send it to the jury. See *Hamilton* v. *United States*, 433 F. 2d 526, 530 (C.A.D.C.), certiorari denied, 402 U.S. 985. Cf. *United States* v. *Carson*, 464 F. 2d 424, 436-437 (C.A. 2), certiorari denied, 409 U.S. 949. Since petitioner has no quarrel with the rule that a jury may generally take evidence to the jury room, petitioner's claim now is, in effect, that the government's failure to play the tape in open court amounted to a withdrawal of the tape from evidence. Petitioner cites nothing in this record or in the law to support such a novel contention. Furthermore, had petitioner perceived it to be to his advantage to play the tape in the jury's presence, he could have done so; his decision not to play the tape cannot invalidate the court's decision to allow the jury to take the

tape to the jury room, particularly when, as noted, petitioner failed to object to that decision at the time it was made.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MARCH 1978.

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[4]Petitioner's complaint (Pet. 11) directed to the court of appeals' summary affirmance of his conviction is also without merit. See *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n. 4.

DOJ-1978-03